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No. 87-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RAY WILL,

Petitioner,

v.

MICHIGAN DEPARTMENT OF STATE POLICE, AND DIRECTOR OF MICHIGAN STATE POLICE,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Michigan

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BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, MICHIGAN LEGAL SERVICES, AND CENTER FOR CONSTITUTIONAL RIGHTS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

The resolution of this case will have a significant impact upon the extent to which those who are injured by the unconstitutional actions of states and state officials

[1] The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 32.2. A description of *amicus* organizations and a statement of their interests appear in the Appendix hereto.

can secure complete relief. Plaintiffs' ability to name states as defendants in state court actions and to seek appropriate relief from states where their policies have infringed on federal rights is important both to permitting effective litigation and to achieving *Amici*'s broader purpose of deterring unlawful state conduct.

SUMMARY OF ARGUMENT

In resolving the important issue of statutory interpretation presented by this case, the Court must look to evidence of the congressional intent in enacting 42 U.S.C. § 1983. First, the legislative history demonstrates that Congress intended Section 1983 to provide a comprehensive civil remedy that would protect against the full range of conduct prohibited by the Fourteenth Amendment. Because the substantive protections of the Fourteenth Amendment are directed specifically against the states and state conduct, the remedial provisions of Section 1983 created to enforce those protections by necessity also must be directed against the states. That conclusion is supported further by the larger historical context in which Congress enacted Section 1983, a context which makes clear that Congress intended Section 1983 to be part of a constitutional and statutory scheme mandating respect for federal civil rights both by states as well as by individuals.

Second, Section 1983 must be interpreted consistent with the broad remedial purposes it was enacted to achieve. Congress clearly intended Section 1983 to serve the dual purposes of providing just compensation to the victims of federal rights violations and deterring such violations in the future. Unless this Court reverses the decision below and holds that states are "persons" answerable for their own misconduct under Section 1983, the dual purposes of the statute will be undermined and the protection of federal rights will be left unsecured.

ARGUMENT

I. THE LEGISLATIVE HISTORY AND HISTORICAL CONTEXT OF THE CIVIL RIGHTS ACT OF 1871 DEMONSTRATE THAT THE 42D CONGRESS INTENDED STATES AND STATE OFFICIALS TO BE INCLUDED WITHIN THE MEANING OF "PERSON" UNDER SECTION 1983.

The Michigan Supreme Court misunderstood the question presented by this case. In holding that states and state officials [2] are not "persons" within the meaning of Section 1983, the Michigan Supreme Court confused the definitional question of the scope of Section 1983 with the Eleventh Amendment jurisdictional issue whether *federal* courts are barred from presiding over Section 1983 actions in which states are named defendants.[3] To answer the definitional question presented here, this Court should focus on the history and purpose of Section 1983, not on Eleventh Amendment jurisdictional consid-

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[2] Because a suit against a state agency or a state official in his official capacity is for all practical purposes a suit against the state itself, any reference in this brief to the state as a proper "person" defendant under Section 1983, unless otherwise indicated, includes state agencies and state officials acting in their official capacities. *See Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974) (state officials); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945) (state agency).

[3] The source of this confusion is the Michigan Supreme Court's reliance on this Court's decision in *Quern* v. *Jordan*, 440 U.S. 332 (1979). In *Quern*, the Court affirmed the holding of *Edelman* v. *Jordan*, 415 U.S. 651 (1974), that Section 1983 did not remove the Eleventh Amendment bar to actions against states in federal court. 440 U.S. at 341. The Eleventh Amendment concerns at issue in *Quern*, however, are irrelevant in state court actions such as this one. Indeed, as the court below itself at one point acknowledged: "*Quern* . . . left without a definite answer the question whether it intended the term 'person' to include states for purposes of Section 1983 actions in state courts in which the Eleventh Amendment would not apply . . . ." *Smith* v. *Department of Public Health*, 428 Mich. 540, 571, 410 N.W.2d 749, 763 (1987).

erations that are wholly inapplicable to an action brought in *state* court.[4]

This Court recognized the distinct nature of those statutory interpretation and Eleventh Amendment questions in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). There the Court determined that municipalities were "persons" under Section 1983 by examining the legislative history of the Civil Rights Act of 1871 ("the 1871 Act"),[5] Section 1 of which became 42 U.S.C. § 1983 (1979) ("Section 1983"). *Id.* at 690 n.55.[6] That same legislative history demonstrates that the 42d Congress also intended states to be "persons" within the meaning of Section 1983. In light of Congress' intent to provide a broad compensatory and deterrent remedy for violations of federally protected rights under color of state law, any other interpretation of "person" would seriously undermine the objectives of the statute.

A. The legislative history of the 1871 Act demonstrates that Congress intended to exercise its full power under Section 5 of the Fourteenth Amendment to provide a broad civil remedy against states for deprivations of federal rights.

1. Congress' intent to include states and state officials within the definition of "person" under Section 1983 is evident from the debates on the 1871 Act.

Section 1983 provides a cause of action against "every person" who deprives another of a federal constitutional

[4] *See Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("No Eleventh Amendment question is present, of course, when an action is brought in a state court since the Amendment by its terms restrains only '[t]he judicial power of the United States.'").

[5] Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

[6] As in the instant case, Eleventh Amendment considerations were not relevant to the Court's decision in *Monell*. *See Monell*, 436 U.S. at 690 n.54. (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976); *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890)).

or statutory right under color of state law.[7] The 1871 Act, introduced in the House on March 28, 1871 as H.R. 320, was entitled "A Bill to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for Other Purposes" ("the Bill").[8] Representative Shellabarger, author of H.R. 320, and its manager in the House, opened the debates on the Bill with a speech on its scope. He explained that because the Bill was enacted to enforce the provisions of the Fourteenth Amendment, which were directed at the states,[9] the Bill authorized a remedy against the states for violations of the Amendment's prohibitions. *See* Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871). Otherwise, he recognized, the protections of the Fourteenth Amendment would be "a miserable waste of words":

> If, after all this transcendent profusion of enactment *in restraint of the States* and affirmative conferment of power on Congress, *the States still remained unrestrained*, . . . then not only is the profusion of

[7] The 1871 Act contained six sections. Section 1, as reenacted in 1874 and subsequently codified in 42 U.S.C. § 1983, provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1979) (emphasis added).

[8] Cong. Globe, 42d Cong., 1st Sess. 317 (1871). The 1871 Act was one of a series of acts directed primarily at halting the increasing violence in the South against recently emancipated slaves. *See* discussion of historical context *infra* at I.B.

[9] The language of the Fourteenth Amendment is specifically directed to the states: "No State shall . . . ." U.S. Const. amend. XIV, § 1. *See, e.g., Ex parte Virginia*, 100 U.S. 339, 346-347 (1880); *The Civil Rights Cases*, 109 U.S. 3, 9 (1883). For further discussion of the purposes of the Fourteenth Amendment, *see* note 35 *infra*.

> guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be.

Id. (emphasis added).[10]

There was little congressional debate on Section 1 of the 1871 Act. The court below assumed that the lack of objections from congressmen concerned about state sovereignty indicated that the 42d Congress could not have intended Section 1983 to encompass states and state officials. That attempted reading of congressional silence is unfounded and ignores the context surrounding the discussions on Section 1983. Given that the other sections of the 1871 Act and the previously enacted Civil Rights Act of 1866 ("the 1866 Act")[11] imposed penalties on the states more severe than the civil remedy suggested by Section 1 of the 1871 Act, Congress already had resolved itself to imposing obligations directly upon the states.[12] When compared to the remedies authorized by

[10] *See also* Cong. Globe, 42d Cong., 1st Sess. 367-368 (1871) (Rep. Sheldon) ("[T]hese amendments [Thirteenth, Fourteenth and Fifteenth] enlarge the power of the Government *in controlling the action of the States*, and I believe that it can extend its powers, through its courts, in times of peace, directly to the individual citizen who is deprived of his rights, privileges, and immunities, whether through the positive act or the default of the State authorities.") (emphasis added).

[11] Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

[12] The other sections of the 1871 Act imposed against the states measures considered more stringent than simple money judgments. For example, Section 2 imposed federal civil and criminal liability on conspiracies within the states to catch state inhabitants who were escaping conviction in state courts; Section 3 authorized the President to call in federal troops to take over state functions; the Sherman Amendment, proposed as Section 7, raised the possibility of imposing vicarious liability on local governments for damages caused by mob violence. Furthermore, many members of the 42d Congress had passed the Civil Rights Act of 1866 only five years earlier, imposing criminal liability on state officials without regard to whether they were exercising state power in good faith reliance

other provisions, the "mild remedy"[13] of Section 1 did not warrant extended debate over its potential effects on the states. As Senator Edmunds, the manager of the Bill in the Senate, noted, Section 1 was "so very simple" because it was "really reenacting the Constitution." Cong. Globe, 42d Cong., 1st Sess. 569 (1871).

In contrast, Congress extensively debated the proposed Sherman Amendment to the 1871 Act, which would have imposed liability for money damages on local governments for failing to enforce laws against private misconduct and violence toward blacks. Debates over that amendment reveal Congress' general willingness to impose liability on the states. The opponents of the Sherman Amendment thought it was unfair to impose policing obligations upon municipalities, which only had police powers to the extent given them by the states.[14] As Representative Willard, a Republican opposed to the Sherman Amendment, but in favor of the 1871 Act, explained, if anyone should be held liable for failing to control private misconduct, it should be the states:

> I hold that this *duty of protection*, if it rests anywhere, *rests in the State*, and that *if there is to be any liability visited upon anybody for a failure to perform that duty, such liability should be brought*

on state law—a severe measure intent on crippling state governments that were violating constitutional rights by deterring individuals from enforcing unconstitutional laws. *See* 17 Stat. 13; Zagrans, *Under Color of* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 543-547 (1985).

[13] Cong. Globe, 42d Cong., 1st Sess. 482 (1871) (Rep. Wilson).

[14] As the Court recognized in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), objections to the Sherman Amendment were motivated not by concerns with imposing monetary liability on the municipalities for their own misconduct, but instead by the unfairness of requiring municipalities to be insurers for all harm caused by discriminatory conduct within their boundaries. *See Monell*, 436 U.S. at 674 n.30; *id.* at 706 (Powell, J., concurring); *Note, Amenability of States to Section 1983 Suits: Reexamining Quern v. Jordan*, 62 B.U.L. Rev. 731, 737 (1982).

> *home to the State.* Hence, in my judgment this section [the proposed Sherman Amendment] would be liable to very much less objection, both in regard to its justice and its constitutionality, if it provided that if in any State the offenses named in this section were committed, *suit might be brought against the State, judgment obtained, and payment of the judgment might be enforced upon the treasury of the State.*

Cong. Globe, 42d Cong., 1st Sess. 791 (1871) (emphasis added).

Moreover, contrary to the opinion below, there is no reason to believe that Congress did not contemplate suits against states when it enacted the 1871 Act. The 42d Congress undoubtedly knew that a state could be subject to suit in federal court if it waived its Eleventh Amendment immunity,[15] or in state court, where the Eleventh Amendment is inapplicable.[16] Congress also knew that Section 1983 actions could be brought in state court because the state courts possessed "concurrent power to enforce the Constitution of the United States within their respective limits. . . ." *Patsy* v. *Board of Regents*, 457

[15] The concept of waiver of Eleventh Amendment immunity would have been known to the 42d Congress. Waiver of immunity was discussed in opinions of this Court long before 1871. *See Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 442 (1793) ("[I]f the Prince gives the subject leave to enter an action against him . . . in his own Courts . . . ."). And various forms of waiver existed at the time. *See, e.g., Clark* v. *Barnard*, 108 U.S. 436, 447 (1883) (entering a general appearance constitutes waiver); *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904, 907-908 (1824) (giving state bank capacity to sue and be sued constitutes waiver). Indeed, waiver of Eleventh Amendment immunity would have been much easier in 1871 than it is now. *Compare Clark* v. *Barnard*, 108 U.S. 436, 447 (1883) (despite the Eleventh Amendment, state's "appearance in a court of the United States would be a voluntary submission to its jurisdiction"), *with Edelman* v. *Jordan*, 415 U.S. 651 (1974) (state allowed to raise Eleventh Amendment defense for first time in court of appeals).

[16] *See Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

U.S. 496, 507 (1982) (*quoting* Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871)).[17]

In enacting the Civil Rights Acts, "Congress . . . articulated a theory of national citizenship and federally enforceable rights that assumed concurrent responsibility and authority . . . to enforce and protect the civil rights of Americans." [18] Congress was adding to the jurisdic-

[17] *See also* Cong. Globe, 42d Cong., 1st Sess. 661 (1871) (Sen. Vickers). Concurrent jurisdiction over Section 1983 actions has been recognized by this Court. *Martinez* v. *California*, 444 U.S. 277, 283-284 n.7 (1980) (Congress not barred from requiring state courts to entertain Section 1983 actions); *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n.1 (1980) ("Any doubt that state courts may also entertain . . . [Section 1983] actions was dispelled by *Martinez* v. *California*"); *see Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981) (Court relied heavily on availability of state court Section 1983 action to support exclusion of certain Section 1983 damage actions from federal court). Evidence of Section 1983 actions in state courts prior to 1969 is sparse, however. *See* Steinglass, *The Emerging State Court § 1983 Action: A Procedural Review*, 38 U. Miami L. Rev. 381, 393 n.52. (1984).

[18] R. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights*, 1866-1876, p. 3 (1985). *See* Cong. Globe, 42d Cong., 1st Sess. 429 (1871) (Rep. McHenry) ("[A]s a question of policy. . . . it is manifestly to the best interests of the people that the State, through her courts, should enforce the privileges and immunities guarantied [sic] by this section. The Federal Government has but two or three courts in any state, and in some only one. The contests among citizens under this provision will be numerous, and it is a tyranny to drag people hundreds of miles from their homes to have their cases tried before courts . . . where the facts will be determined by a jury of the vicinage."). *See also Patsy* v. *Board of Regents*, 457 U.S. 496, 507 (1982) (citing Cong. Globe, 42d Cong., 1st Sess. App. 216 (1871) (Sen. Thurman, member of Senate Judiciary Committee) (Congress intended to provide dual or concurrent forums in the state and federal courts to enable a plaintiff to choose her forum)); Note, *Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1150 (1977) ("the prevailing assumption [at the time that the 1871 Act was passed] had been that the state courts were the appropriate forum for the enforcement of federal law."); Hart & Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 844-845 (2d

tion of the federal courts not subtracting from that of the state courts. *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980).

This Court implicitly, if not explicitly, already has recognized that the 42d Congress intended states and state officials to be "persons" under Section 1983. Various members of this Court have stated that Section 1983 actions may be brought against states or state officers.[19] In addition, this Court has entertained and approved relief in numerous Section 1983 cases against public officials in their official capacities,[20] and against states,[21] without dismissing the suits for failure to state a claim under

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ed. 1973) ("Although the protection of federally granted rights was a primary purpose for the establishment of a system of federal courts, the principle established by the first Judiciary Act was that private litigants must look to the state tribunal in the first instance for vindication of federal claims.").

[19] *See, e.g., Maine* v. *Thiboutot*, 448 U.S. 1, 22 n.10 (1980) (Powell, J. dissenting) ("Section 1983 actions may be brought against states, municipalities and other subdivisions, officers, and employees . . . ."); *Monell*, 436 U.S. at 682 ("Section 1 without question could be used to obtain a damages judgment against *state* or municipal *officials* who violated federal constitutional rights while acting under color of law.") (emphasis added) (citing Cong. Globe, 42d Cong., 1st Sess. 334 (1871) (Rep. Hoar); *id.* at 365 (Rep. Arthur); *id.* at 367-368 (Rep. Sheldon); *id.* at 385 (Rep. Lewis); *id.* at App. 217 (Sen. Thurman)); *id.* at 700 ("[E]veryone—proponents and opponents alike—knew § 1983 would be applied to state officers and nonetheless stated that Section 1983 was constitutional.").

[20] *See, e.g., Alabama* v. *Pugh*, 438 U.S. 781 (1978) (Court ordered dismissal of state from action on Eleventh Amendment grounds but allowed lower court's mandatory injunction to stand against state officials); *Vlandis* v. *Kline*, 412 U.S. 441, 444-445, 454 (1973) (Court affirmed an order in a Section 1983 action directing a public official to reimburse excess tuition payments that had been improperly collected from students); *Griffin* v. *School Bd.*, 377 U.S. 218, 233 (1964) (Court authorized issuance of an order requiring public officials to exercise their power to levy taxes to raise funds, if necessary, to reopen the public schools).

[21] *See, e.g., Maine* v. *Thiboutot*, 448 U.S. 1 (1980); *Martinez* v. *California*, 444 U.S. 277 (1980).

Section 1983. *See Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306-307 (1962) ("Too many important decisions of this Court have proceeded on the premise that public officials in their official capacities are 'persons' under Section 1983 for the question to be considered other than settled."). The same reasoning applies equally to state defendants.

2. *The legislative history also demonstrates the 42d Congress' intent to exercise its full Fourteenth Amendment power to provide a complete remedy for deprivations of the rights protected by that Amendment.*

The remedy available under Section 1983 was intended to be broad enough to fulfill the purpose of the 1871 Act to enforce the prohibitions of the Fourteenth Amendment. "[T]here can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell*, 436 U.S. at 700. As Representative Wilson proclaimed:

> By the fifth section of the fourteenth article Congress has power to enforce the provisions of the article by appropriate legislation. Now, I ask, what legislation could be more appropriate than to give to a person injured by another under color of such unconstitutional State laws a remedy by civil action? . . . . [T]here are certain rights, privileges, and immunities . . . Congress may enforce by legislation; and it is proposed to enforce them by this Bill . . . .

Cong. Globe, 42d Cong., 1st Sess. 482 (1871). Because the prohibitions of the Fourteenth Amendment were directed at the states, logic dictates that the 42d Congress intended that the statute designed to enforce fully the Amendment reach the states as well.

The plain language of Section 1983 demonstrates the breadth of relief that Congress intended to make available under Section 1983. The statute creates a cause of

action for "redress" by the "party injured" against "every person" who violates federal rights and provides for the broadest possible relief through "an action at law, suit in equity, or other proper proceeding." Nowhere in the statute did Congress indicate that the "party injured" should go without "redress" when the wrongdoing "person" is a state or state agency and the relief sought is monetary. If Congress had intended to exclude states from the operation of Section 1983, it easily could have prohibited all awards against individuals or entities that impact upon the state and its treasury.[22]

The legislative history of the 1871 Act further demonstrates that Congress intended to provide a broad remedy, reaching at least those types of state conduct proscribed by the Fourteenth Amendment. Congress passed the 1871 Act to address the acts of racial violence rampant at the time:

> [W]hen violence and lawlessness are universally prevalent, the denial of equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to section five [of the Fourteenth Amendment] . . . . *The authority thus conferred is subject to no restrictions or limitations.*

Cong. Globe, 42d Cong., 1st Sess. 322 (1871) (Rep. Stoughton) (emphasis added).

In opening the debate on the 1871 Act, Representative Shellabarger emphasized the broad scope of Section 1:

[22] This Court has recognized the broad reach of Section 1983 by entertaining actions thereunder against state officials in their official capacities and allowing relief. *See* note 20 *supra*. In federal courts, remedies in such cases have been limited to prospective injunctive relief because of Eleventh Amendment concerns. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Ex parte Young*, 209 U.S. 123 (1908). Again, however, those jurisdictional limitations are not inherent in the Section 1983 cause of action and do not apply to this Section 1983 action brought in *state* court. *See Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

> This Act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed . . . [and] *the largest latitude consistent with such words employed* is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. *These provisions of the Fourteenth Amendment are wholly devoted to securing the equality and safety of all the people, as is this Section [Section 1], and, indeed the entire bill.*

Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871) (*quoted with approval in Monell*, 436 U.S. at 684) (emphasis added). *See also* Cong. Globe, 42d Cong., 1st Sess. 317 (1871). Representative Dawes similarly commented on the broad reach of the Bill:

> No subject for legislation was ever brought before the American Congress so broad and comprehensive, embracing as it does all other considerations hitherto affecting the life, liberty and pursuit of happiness of every citizen of this Republic.

Cong. Globe, 42d Cong., 1st Sess. 475 (1871). Senator Thurman, leader of the opposition in the Senate, was most concerned that: "[T]here is no limitation whatsoever upon the terms that are employed, and they are as comprehensive as can be used." Cong. Globe, 42d Cong., 1st Sess. App. 217 (1871).

B. The historical context of the 1871 Act also demonstrates that Congress intended to provide a direct and comprehensive remedy against state violations of the Act's provisions.

The 1871 Act was one in a series of enactments, including the 1866 Act, the Fourteenth Amendment, and the Enforcement Act of 1870 (the "1870 Act"),[23] passed by Congress to protect individual rights in the wake of

[23] Act of May 31, 1870, ch. 114, 16 Stat. 140.

post-Civil War violence. Section 1983 was part of a constitutional and statutory scheme intended to enforce both state and individual respect for federal civil rights and to prevent constitutional guarantees of liberty and equality from being reduced to unenforceable promises that were rights in name only.[24]

1. *The 1866 Act, Section 2 of which served as the model for Section 1983, was intended to provide a broad remedy against states as well as individuals.*

The 1866 Act[25] was passed primarily in response to state-enacted Black Codes that left "[t]he Negro . . . a slave in all but the constitutional sense."[26] It provided, *inter alia*, for the criminal prosecution of persons, including judges and other state officials, who violated the civil rights of others, and authorized the President to take actions "necessary to prevent the violation and enforce the due execution of this act." The Act was directed at

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[24] In the aftermath of the Civil War, Congress passed three constitutional amendments and a series of civil rights statutes designed to outlaw slavery and prohibit any infringement of the civil rights of former slaves. The Thirteenth Amendment, ratified in 1865, abolished slavery; the Fourteenth Amendment, ratified in 1868, prohibited states from depriving citizens of due process and equal protection under the laws; the Fifteenth Amendment, ratified in 1870, guaranteed suffrage to the emancipated slaves. *See* U.S. Const., amends. XIII, XIV, XV.

[25] The 1866 Act contained ten sections. Section 2, which served as the model for Section 1 of the 1871 Act, provided:

> That any *person* who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, . . . shall be deemed guilty of a misdemeanor, and, on conviction shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the Court.

Act of Apr. 9, 1866, ch. 31, § 2, 14 Stat. 27 (emphasis added).

[26] Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1325 (1952).

states as well as individuals.[27] That one of the objectives of Section 2 of the 1866 Act was to reach the states is clear from the legislative history,[28] and the enforcement of the statute.

Although limited by the nature of the remedy to the criminal prosecution of individuals, Section 2 of the 1866 Act was designed to dismantle the *state* enforcement mechanism being used to prolong the enslavement of blacks. The sanctions of Section 2 were applied repeatedly to state judges and other officials for actions taken in their official capacities pursuant to clear state law commands. That good faith immunity was not a defense to these prosecutions demonstrates that the remedy was a severe one directed at the state through its individual officials.[29] Congress found criminal sanctions to be the

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[27] Section 1 afforded "citizens of every race and color the right to make and enforce contracts, convey real and personal property," and other transactions specifically directed at individuals. 14 Stat. 27 § 1. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 427 (1968) ("[C]ongress had before it [when debating the 1866 statute] an imposing body of evidence pointing to the mistreatment of negroes by private individuals and unofficial groups, mistreatment unrelated to any hostile state legislation."). The legislative history of the Act forcefully demonstrates an intent to deter civil rights violations by *all* persons, including states. *See* Cong. Globe, 42d Cong., 1st Sess. App. 85-86 (1871) (Rep. Shellabarger), *quoted with approval* in *Quern* v. *Jordan*, 440 U.S. 332, 362 (1979) (Brennan, J., concurring).

[28] "[*The bill's*] *whole force is expended in defeating an attempt, under State laws*, to deprive races and the members thereof as such of the rights enumerated in this Act. This is the whole of it." Cong. Globe, 39th Cong., 1st Sess. 1293-1294 (1866) (Rep. Shellabarger) (emphasis added).

[29] "It cannot be claimed that the persons . . . could not be punished under the provisions of this bill because they were acting as officers and their conduct was the result of errors of judgment only. That would be no valid defense—no defense at all—against the positive terms of this law." Cong. Globe, 39th Cong., 1st Sess. 1271 (1866) (Rep. Kerr). *See Zagrans supra* note 12 at 543, 545. That Section 2 authorized the incarceration of judges demonstrates the severity of the remedy intended. *See* Cong. Globe, 39th Cong., 1st

most effective method at the time to thwart the enforcement of discriminatory state laws and to deter future discriminatory legislation. Senator Trumbull, sponsor of the Bill, felt that a comprehensive remedy would quickly put an end to the discrimination occurring throughout the nation.[30] Section 1983 was modeled after Section 2 of the 1866 Act to bring the full force of congressional power to bear upon individuals and states.[31]

In 1870, two months after ratification of the Fifteenth Amendment, Congress reenacted the 1866 Act in the 1870 Act.[32] The 1870 Act retained the severe criminal sanctions of the 1866 Act and added provisions to prohibit interference with the exercise of voting rights.[33] Congress

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Sess. 475, 1154, 1156, 1265 (1866) (Reps. Eldridge and Davis, opponents of the Bill).

[30] "When it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease." Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull).

[31] As Senator Edmunds, the manager of the Bill in the Senate, stated: "[T]he first section is one . . . defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights Bill [of 1866], which have since become a part of the Constitution." Cong. Globe, 42d Cong., 1st Sess. 568 (1871). *See also* Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871) (Rep. Shellabarger), *quoted with approval in Quern* v. *Jordan*, 440 U.S. 332, 362 (1979) (Brennan, J., concurring).

[32] Section 18 of the 1870 Act expressly reenacted the 1866 Act. *See* 16 Stat. 144, § 18. Section 2 of the 1866 Act was reenacted as Section 17 of the 1870 Act. The 1870 Act adopted the language of Section 2 of the 1866 Act almost in its entirety, though Congress slightly modified the language to include a broader class of violations. *Compare* 16 Stat. 144, § 17 *with* 14 Stat. 27, § 2.

[33] This Court, in *United States* v. *Price*, 383 U.S. 787 (1966), explained the purpose and scope of the 1870 Act:

> The purpose and scope of the . . . 1870 enactment must be viewed against the events and passions of the time . . . . The

intended both the 1866 and 1870 Acts to provide a broad remedy that would reach the states as well as individuals.[34]

2. *The Fourteenth Amendment, passed to provide a constitutional basis for the 1866 Act, was clearly directed at the states.*

The Fourteenth Amendment was ratified in 1868. The language of the amendment and its legislative history demonstrate that the drafters of the Fourteenth Amendment intended to reach the states.[35] The overriding pur-

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Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and assaults was launched including assassinations designed to keep Negroes from the polls. The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man. 383 U.S. at 803-804.

[34] "[I]t is better to invade the judicial power *of the State* than permit it to invade, strike down, and destroy the civil rights of the citizens . . . ." Cong. Globe, 39th Cong., 1st Sess. 1837 (1866) (Rep. Lawrence in support of the 1866 Act) (emphasis added).

[35] Representative Bingham, author of Section 1 of the Fourteenth Amendment, told his colleagues during the 1871 debate that he had used the "no state shall" formulation for the precise purpose of overruling the Supreme Court's decision in *Barron* v. *Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). He explained, "[T]he city had taken private property for public use without compensation as alleged, and there was no redress for the wrong in the Supreme Court of the United States." Cong. Globe, 39th Cong., 1st Sess. App. 84 (1866). *See Ex parte Virginia*, 100 U.S. 339, 346-347 (1880) (The prohibitions of the Fourteenth Amendment "are directed to the States . . . . They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken."); *The Civil Rights Cases*, 109 U.S. 3, 9 (1883) (The "abrogation and denial of rights, for which the States alone were or could be responsible was the great seminal and fundamental wrong which was intended to be remedied [by the Fourteenth Amendment]").

pose of the amendment was to enable Congress effectively to reach the states to guarantee civil rights for all citizens. As stated by Representative Wilson, Chairman of the Judiciary Committee, "[T]his bill *invades the States to enforce equality* of rights in respect to those things which properly and rightfully depend on State regulations and laws." Cong. Globe, 39th Cong., 1st Sess. 1294-1295 (1866) (emphasis added).

The Fourteenth Amendment also was intended to provide a constitutional basis for the civil rights statutes.[36] Congress intended to place responsibility for respecting civil rights directly on the states under the Constitution, despite the fact that the 1866 Act directed at states and individuals already existed. As stated by Representative John Broomall: "If we are already safe with the civil rights bill, it will do no harm to become the more effectually so, and to prevent a mere majority from repealing the law and thus thwarting the will of the loyal people." Cong. Globe, 39th Cong., 1st Sess. 2498 (1866).

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[36] During the debate on the 1866 Act, Representative John Bingham opposed the Bill because he felt that Congress had no power to pass such a provision without a constitutional amendment. In proposing a draft of the Fourteenth Amendment, he clearly stated an intent to reach the same misconduct that Section 2 of the 1866 Act prohibited:

> The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, *to punish officials of States for violation of the oaths enjoined upon them by their Constitution?*

Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (emphasis added).

II. INCLUDING STATES WITHIN THE DEFINITION OF "PERSON" UNDER SECTION 1983 FULFILLS THE PURPOSE OF THE 42D CONGRESS TO REMEDY DEPRIVATIONS OF FEDERAL RIGHTS UNDER COLOR OF STATE LAW THROUGH ADEQUATE COMPENSATION AND EFFECTIVE DETERRENCE.

The question of whether the state is a "person" under Section 1983 must be answered so as to effectuate the general purpose of the 42d Congress "to provide compensation to the victims of past abuses . . . [and] to serve as a deterrent against future constitutional deprivations." *Owen* v. *City of Independence*, 445 U.S. 622, 651 (1980).[37] Unless this Court holds that states are "persons" under Section 1983, the relief available will be limited in a manner that undermines Section 1983's dual purposes of compensation and deterrence.[38]

A. States must be "persons" under Section 1983 to ensure that compensation for victims of federal rights violations under color of state law is available, adequate, and fair.

Under the Michigan Supreme Court's interpretation of the word "person" in Section 1983, to obtain any

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[37] "It is ancient wisdom that statutes should be interpreted so that the manifested purpose or object can be accomplished." 2A C. Sands, *Sutherland Statutory Construction*, § 58.06, at 723 (4th ed. 1987). *See United States* v. *Zazove*, 334 U.S. 602, 610 (1948).

[38] It is clear from the legislative history that Congress intended to provide broad relief to victims of constitutional deprivations under color of state law. *See supra* at I.A. This does not mean, however, that relief under Section 1983 should be limited to 1871 notions of recovery. Rather, Section 1983 should be interpreted in order to effectuate the broad remedial purpose of the statute. "The section's purpose was to provide redress for the deprivation of civil rights. . . . The methods may have changed; the means may have become more subtle; but the wrong to be remedied still exists." *Pierson* v. *Ray*, 386 U.S. 547, 563 (1967) (Douglas, J., dissenting).

recovery for deprivations of federal rights under color of state law a plaintiff must sue an individual defendant in his personal capacity for monetary damages or seek injunctive relief against a state official under the fiction of *Ex parte Young*, 209 U.S. 123 (1908). Neither of these alternatives ensures that the intent of the 42d Congress to provide full compensation is fulfilled.

In the instant case, as in many other Section 1983 cases,[39] monetary damages are necessary to compensate fully a plaintiff.[40] An injunction would have been wholly ineffective in vindicating petitioner's constitutional rights. Michigan's unconstitutional denial of petitioner's promotion occurred in 1973. Petitioner did not learn of the violation of his constitutional rights until 1977, after the law authorizing the "Red Squad" was declared unconstitutional. *See* Pet. Br., Statement of the Case. By that time there was no need to enjoin the state from future unconstitutional activity. The harm had been done, and petitioner was entitled to be compensated for his lost wages, career loss, and emotional distress.[41]

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[39] *See* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 219-227 nn.105-107 (1981) (and cases cited therein).

[40] As this Court has recognized: "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." *Owen*, 445 U.S. at 651.

[41] The trial court agreed and awarded petitioner $584.64 for lost wages, $40,544 for career loss, $56,052 for emotional distress, and $56,052 in exemplary damages. *See* Pet. Br., Statement of the Case. The Michigan Supreme Court's decision negated these damages.

1. *Including states as "persons" under Section 1983 ensures that compensation is available.*

Because state officials sued in their personal capacity often may be protected from liability by common law immunities,[42] individual capacity suits will leave many civil rights plaintiffs without any compensation for violations of their federally protected rights resulting from state laws, policies or customs. In the instant case, petitioner's constitutional rights were violated by individuals exercising power pursuant to and required by state law.[43] A court could have found that, prior to 1976 when the law was declared facially unconstitutional, a reasonable person would not have known that the law violated "clearly established" constitutional rights. Thus, if petitioner had sued an individual official in his or her personal capacity, recovery may have been barred by qualified immunity.

By holding that states are "persons" within the meaning of Section 1983, plaintiffs with meritorious claims will be able to recover damages directly from the state when the state's laws, policies or customs violate their federally protected rights. The policies supporting the qualified immunity protection given to individual officials

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[42] *See, e.g., Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (executive officials protected from liability for discretionary conduct that does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known"); *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967) (police officers not liable for actions taken in "good faith and [with] probable cause").

[43] The Michigan state law under which the files of petitioner's brother were kept stated: "The state police *shall* collect information and evidence relating in any manner to activities prohibited by this act." Pet. Br., Statement of the Case (emphasis added). The law further provided: "The commissioner may furnish information contained [in confidential files of information on activities that are subversive of government] to the responsible heads of any agency having charge of employment by the state." *Id.*

have no application in an action against a state that itself has initiated an unconstitutional policy or practice.

In addition to the qualified immunity barrier, a civil rights plaintiff may not be able to secure adequate legal representation to maintain an action against an individual official in the first instance. Attorneys' fees cannot be obtained from the state in a damages action against a state official in his individual capacity, *Kentucky* v. *Graham*, 473 U.S. 159, 167 (1985), and attorneys understandably will be reluctant to initiate litigation against individual officials who may not be able to pay them. Congress, in passing the Civil Rights Attorney's Fees Awards Act of 1976 ("Section 1988"), 42 U.S.C. § 1988 (1976), recognized that many civil rights violations would go without a remedy if attorneys' fees were not available for Section 1983 suits. As Congress explained when it enacted Section 1988:

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, the citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Admin. News (90 Stat.) 5908, 5910. Thus, the low-income victim of constitutional deprivations under color of state law may have no recourse. This result would clearly be contrary to Congress' intent when it enacted both Section 1983 and Section 1988.

There are other barriers that may prevent recovery against a state official in his personal capacity. For example, the plaintiff may not be able to identify an individual who is amenable to suit for harm caused by a state policy or custom. Often, the problem will be systemic and therefore not attributable to any one individual. *Owen* v. *City of Independence*, 445 U.S. 622, 652 (1980) (" 'systemic' injuries . . . result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.").[44] In some instances, a plaintiff must also establish "a 'pervasive pattern of intimidation' flowing from a deliberate plan by the *named* defendants . . . ." *Rizzo* v. *Goode*, 423 U.S. 362, 375 (1976) (emphasis in original).

Moreover, many civil rights plaintiffs have limited resources and cannot afford the expensive investigations that may be necessary to find an individual defendant. Extensive discovery may be required to identify the individuals who carried out an unconstitutional policy. If the civil rights plaintiff is successful in identifying the individuals responsible, he still may not be able to locate those former state officials who have moved out of the jurisdiction, thus making it difficult to obtain personal jurisdiction over them.

2. *Including states as "persons" under Section 1983 ensures that the compensation is adequate.*

Even assuming that the aforementioned barriers do not preclude the civil rights plaintiff from proceeding to court with a meritorious claim, he faces additional barriers to full recovery in court if the state is not subject to suit under Section 1983. One such barrier occurs at trial when the plaintiff must ask a jury to award monetary damages against a state official. Juries often will be unwilling to assess full compensatory damages against "hard-working, underpaid" low level officials who will

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[44] *See, e.g., Howell* v. *Cataldi*, 464 F.2d 272, 282-284 (3d Cir. 1972) (directed verdict in favor of defendant police officers where plaintiff could not specifically identify the police officers who had beaten him); *see also* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 224 (1981) ("plaintiff may have trouble even identifying the wrongdoer, though it is clear that the wrongdoer must be an officer of the state.").

have to pay the judgment out of their own pockets.[45] Even if the state provides indemnification, the juries in many states may not be told that the state will pay for any judgment against the official. *See, e.g.*, Idaho Code, § 6-903(f). Thus, the victim may not receive compensatory damages adequate to remedy his injuries.

Assuming that the jury does award an adequate remedy in a personal capacity action, the state official defendant nevertheless may not have sufficient resources to satisfy the judgment. This is often true when the defendant is a government employee with limited resources and the deprivation of rights is attributable to an unconstitutional policy or custom. As in the instant case, a systemic policy or custom will often harm many people before it is declared unconstitutional. State employees, subject to suit in their individual capacity for enforcing the unconstitutional policy, are likely to have limited resources. One successful claim could bankrupt the employee and preclude recovery for subsequent plaintiffs.

Even state indemnification statutes providing indemnification of state officials for claims brought against them in their individual capacities will not afford relief in many cases.[46] Many state indemnification statutes do not require indemnification but merely "authorize" or give discretion to the governor or other official to decide whether to indemnify. *See, e.g.*, Ind. Code Ann. § 34-4-

[45] *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L. J. 447, 456 (1978); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 224 (1981).

[46] In *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), Justice Powell "assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority." 436 U.S. at 713 n.9. However, the availability of indemnification of state officials is not certain. *See* P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs*, 227 n.1 (1983).

16.7-1 (1976); Me. Rev. Stat. Ann. tit. 14, § 8112 (1980); S.C. Code Ann. § 1-11-140 (Law. Co-op. 1986). Some statutes only cover state tort claims. *See, e.g.*, Iowa Code Ann. § 25A.21 (West Supp. 1988). Often, the amount of indemnity available is limited and will thus not provide full compensation. *See, e.g.*, R.I. Gen. Laws § 9-31-12 (1985) ($50,000); S.D. Codified Laws Ann. §§ 3-19-1, 3-19-2 (1985) ($25,000); Vt. Stat. Ann. tit. 3, § 1103 (1985) ($100,000).

In addition, states can restrict or even abolish their indemnification provisions at any time, leaving the prospect of recovery uncertain for many plaintiffs under Section 1983. Congress must have intended that Section 1983 provide a uniform and complete system of compensation for victims of state misconduct. Leaving the amount of a Section 1983 plaintiff's recovery to the whim of the state will undermine this congressional intent. If the state is not a "person," the plaintiff thus may be without a complete remedy. Although a plaintiff would be subject to similar barriers when the deprivation of his constitutional rights is not attributable to a state policy or custom, the recovery should not be so limited when it is the state that is responsible. *See Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978); *Owen*, 445 U.S. at 651.

3. *Including states as "persons" under Section 1983 ensures that the system of compensation is fair.*

Congress surely intended that the broad remedy under Section 1983 for compensating citizens deprived of their constitutional rights be fair. When a state passes a law or establishes a policy which violates rights guaranteed by the Constitution, justice demands that it be the state that bears the responsibility for compensating the person deprived of those rights. *See Owen*, 445 U.S. at 654 ("Elemental notions of fairness dictate that one who causes a loss should bear the loss."). If the state cannot

be sued for these wrongs, the person whose rights were violated may seek redress only from the state official who carried out the state's commands.[47] But when it is the state's policy or custom and not the state official's independent action that violates the individual's rights, it is unfair to place the burden of compensation on the state official. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974).

There is no unfairness, however, in requiring the state to compensate citizens for violations of their federal rights. A government entity has no " 'discretion' to violate . . . the Federal Constitution; its dictates are absolute and imperative." *Owen*, 445 U.S. at 649 (referring to municipalities). One of these dictates is the Fourteenth Amendment which imposes "absolute" and "imperative" obligations upon the states.[48] "[W]hen execution of a government's policy or custom . . . inflicts the injury the government as an entity is responsible under § 1983." *Id.*

Holding that the state is not a "person" under Section 1983 would place the costs of the state's unconstitutional policies on the shoulders of the victims or the less culpable state officials instead of on the state where it properly belongs. Congress could not have intended such an unjust result when it enacted Section 1983. Justice Powell implicitly recognized this unfairness in *Monell* when he wrote: "It is most unlikely that Congress intended public officials acting under the command or the specific authorization of the government employer to be exclusively liable for resulting constitutional injury." *Monell*, 436 U.S. at 707 (Powell, J., concurring).

A holding that states, like municipalities, are "persons" under Section 1983 also is required to ensure fair

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[47] *See* discussion of limitations of this remedy at II.A.1 and II.A.2. *supra*.

[48] *See, e.g.*, U.S. Const. amend. XIV, § 1 ("No *State* shall . . . .") (emphasis added).

and evenhanded treatment of persons injured by the misconduct of government actions at the state and local levels. The 42d Congress would not have intended that petitioner's recovery depend on whether it was a state law or a city ordinance that denied him his rights. Surely Congress would not have intended that petitioner be allowed recovery only if he had been "fortunate enough" to have been denied his promotion by the Detroit city police department, on the basis of a similar "Red Squad" municipal statute, instead of by the Michigan Department of State Police. Congress would have intended that a remedy be available in either case.

B. States must be "persons" under Section 1983 to ensure efficient deterrence of federal rights violations.

This Court consistently has recognized that Congress intended Section 1983 "not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen*, 445 U.S. at 651; *see also Robertson* v. *Wegmann*, 436 U.S. 584, 590-591 (1978); *Carey* v. *Piphus*, 435 U.S. 247, 256-257 (1978). Placing the deterrent pressure of monetary damages directly on the states is the most logical and efficient means of discouraging state violations of federal rights and encouraging state vigilance in rooting out federal rights violations among its agencies and officials.

It has long been recognized that the threat of monetary damages is an effective deterrent. Restatement of Torts § 944(2) (1939) ("the punishment inherent in the [damages] remedy will have a . . . deterrent effect upon the defendant."). When a plaintiff must seek monetary relief against an individual for the state's unconstitutional laws, policies, and customs, and any one of the many barriers discussed *supra* limit or bar recovery, the state is likewise not deterred. This Court has recognized that "the threat that damages might be levied against the

city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." *Owen*, 445 U.S. at 652. This rationale applies with equal force to the states.

Although some states provide indemnification for state officials sued in their personal capacity, a damage award against the state official rarely will provide the deterrence that Congress intended. Most state statutes do not allow indemnification if the official's conduct or lack thereof was not in good faith. *See, e.g.*, Del. Code Ann. tit. 10, § 4002 (1984) (no indemnification if not in good faith, not wanton or grossly negligent); Ill. Ann. Stat. ch. 127, ¶ 1302(e) (Smith-Hurd 1987) (no indemnification if conduct was "intentional, wilful, or wanton"); Ohio Rev. Code Ann. § 9.87 (Page 1985) (no indemnification if official acted with malicious purpose, in bad faith, or in a wanton or reckless manner). Under the qualified immunity doctrine, if the state official does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), or acts in good faith with a reasonable basis, *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967), he will be immune. In most instances where the indemnification statute would cover the official's conduct, the qualified immunity doctrine will bar liability anyway and the state will not have to pay damages. Additionally, the state will not even be required to pay for the defense of the state official because the issue of immunity must be resolved before discovery will be allowed. *Harlow*, 457 U.S. at 818. Thus, states rarely will be deterred by personal capacity suits against their officials.

If the civil rights plaintiff chooses the other option available under the lower court's reading of Section 1983, an injunction against a state official in federal court under *Ex parte Young*, 209 U.S. 123 (1908), the deterrent effect on the state will be prospective only.

Without the potential threat of a damage award against the state, there will be little incentive for the state to identify and avoid unconstitutional governmental laws, policies, and customs before individuals are deprived of their constitutional rights.

With less care taken on the part of the state, many more violations will occur and more plaintiffs will be forced to seek redress from the courts. In addition, individuals forced to seek injunctions must go to court to obtain them and ensure that they are enforced. The threat of a monetary damage award against the state may prevent the violation before it occurs and reduce the need to run to the courthouse for relief. Congress surely intended that Section 1983 deter constitutional violations efficiently. Making states accountable "persons" under Section 1983 is the most efficient method possible.

CONCLUSION

This Court should hold that states are "persons" within the meaning of Section 1983 for "[t]o take away all remedy for the enforcement of a right is to take away the right itself." *Poindexter* v. *Greenhow*, 114 U.S. 270, 303 (1885). Accordingly, the decision below should be reversed.

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APPENDIX

DESCRIPTION OF *AMICI* ORGANIZATIONS

The Lawyers' Committee for Civil Rights Under Law is a non-profit corporation organized in 1963 at the request of President Kennedy. The Lawyers' Committee has dedicated its resources to securing private counsel for victims of race discrimination and to securing for all persons equal justice under the law. To this end, the Lawyers' Committee has participated in numerous cases in this Court urging that Section 1983 be construed to provide redress to civil rights litigants.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal object is to secure, through litigation and education, the civil rights of Hispanics living in the United States. MALDEF's position, as stated herein, has developed through extensive litigation under the Fourteenth Amendment and 42 U.S.C. § 1983.

The National Association for the Advancement of Colored People (NAACP) is an organization dedicated to the furtherance of racial equality as well as social and economic justice in this country. To promote those ends, the NAACP and its members often initiate litigation in both federal and state courts to enforce federal constitutional and statutory rights. The NAACP's ability to name states as defendants in state court actions and to seek appropriate relief from states where their policies have infringed on federal rights is important both to permitting effective litigation and to achieving our broader purpose of deterring unlawful state conduct.

The Michigan Trial Lawyers Association comprises lawyers representing injured persons. The Association is dedicated to advancing the science of jurisprudence and promoting the administration of justice for the pub-

lic good. Association members currently represent persons injured as a result of state action on the part of police and other agents of the State of Michigan. It is because of this interest that the Michigan Trial Lawyers Association, through its *Amicus Curiae* Committee, supports the position of the Petitioner herein.

Michigan Legal Services is interested in the outcome of this case because it represents many impoverished individuals who require redress from state governmental agencies and who may be denied access to the courts by the holding of the court below. Michigan Legal Services is currently and has been counsel to persons whose homes have been subject to foreclosure when the state welfare agency involuntarily vendored their mortgage payment and also to persons wrongfully denied payment for medical procedures by the same state agency. These clients' efforts to obtain fair compensation for their injuries and even prospective relief will be impeded unless the decision below is reversed.

The Center for Constitutional Rights was born of the civil rights movement and the struggle of black people in the United States for true equality. Center for Constitutional Rights attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing, and employment discrimination. Through litigation and public education we have worked to protect and make meaningful the constitutional and statutory rights of women, blacks, Puerto Ricans, native Americans, and Chicanos.